

Supreme Court, U. S.

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No. 77-1294

In the
Supreme Court of the United States

OCTOBER TERM, 1977

WILLIE REEVES,

Petitioner,

vs.

MIKEL WAND,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT**

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**PETITION FOR WRIT OF CERTIORARI
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Willie Reeves, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on November 16, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit reversing and remanding the dismissal of plaintiff's cause of action is unreported. That unreported opinion is attached hereto as Appendix A. The opinion which it incorporates by reference is reported at 563 F.2d 331 (7th Cir. 1977) and is attached hereto as Appendix B. The decision of the United States District

Court for the Northern District of Illinois, Eastern Division is attached as Appendix C.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was filed on November 16, 1977. No rehearing was requested. On February 13, 1978 this Court, through Mr. Justice Stevens, entered an order extending the time for the filing of this petition to and including March 17, 1978. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Was the United States Court of Appeals for the Seventh Circuit required to follow *Auto Workers v. Hoosier C. Corp.*, 386 U.S. 696, 86 S.Ct. 1107 (1966), *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 463, 95 S.Ct. 1716 (1975) and *Runyon v. McCray*, U.S., 96 S.Ct. 2586 (1976) in deciding which state statute of limitations to borrow in a 42 U.S.C. Sec. 1983 civil rights suit?
2. Is the procedure for borrowing state statute of limitations an important federal question which the United States Supreme Court should decide in light of the split of authority in the United States Courts of Appeals?

STATUTORY PROVISIONS INVOLVED

Ch. 83 Sec. 15 Ill. Rev. Stat. (1975)

Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction, or for seduction, or for criminal conversation, shall be commenced within two years next after the cause of action accrued.

Ch. 83 Sec. 16 Ill. Rev. Stat. (1975)

Except as provided in Section 2-725 of the "Uniform Commercial Code," approved July 31, 1961, as amended and Section 11-13 of "The Illinois Public Aid Code," approved April 11, 1967, as amended, actions on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

STATEMENT OF THE CASE

A. Procedural Background

Plaintiff filed an amended complaint in the United States District Court for the Northern District of Illinois, Eastern Division, alleging in his jurisdictional statement that the suit arose under 42 U.S.C. 1983. The gist of the complaint is that the plaintiff was falsely imprisoned by the defendant and was physically injured during the arrest. Defendant Reeves filed a Motion for summary judgment raising various defenses, one of which was that the action was time barred pursuant to Ch. 83, Sec. 15, Ill. Rev. Stat. That motion was denied by District Judge Leighton on December 28, 1976. Defendant Reeves filed a Motion to Reconsider and on March 18, 1977 Judge Leighton ruled that the action was barred and he dismissed the action. Plaintiff filed his notice of appeal on April 5, 1977. The Seventh Circuit Court of Appeals reversed and remanded on the basis of their recently decided case of *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977). The defendant, Willie Reeves, takes this petition for a writ of certiorari for the purpose of reviewing that action by the Seventh Circuit.

**B. Facts Material To The
Question Presented For Review**

Petitioner was a Deputy Sheriff of Cook County, Illinois who was overseeing a court ordered eviction. He became involved in an incident with the Respondent which led to a struggle between the two and the ultimate arrest of the respondent. Respondent complained of being falsely arrested and physically injured during the incident. He filed his 42 U.S.C. §1983 "civil rights" case in which he asserted those claims. The date of the incident was March 1, 1972. The original action was filed January 23, 1975. Ch. 83 Sec. 15 *Ill. Rev. Stat.* (1975) establishes a two year statute of limitations for false arrest and personal injuries; Ch. 83 Sec. 16 *Ill. Rev. Stat.* provides a five year statute of limitations for actions not otherwise provided for.

REASONS FOR GRANTING THE WRIT

A.

**THE COURT OF APPEALS FOR THE SEVENTH
CIRCUIT HAS DECIDED A FEDERAL QUESTION
IN CONFLICT WITH APPLICABLE DECISIONS OF
THIS COURT.**

Early cases of this Court make clear that when federal remedial statutes lack a specific period of limitations, "the laws of the several states . . . shall be regarded as [the] rules of decision," in federal courts. This was originally premised upon Rev. St. Sec. 721 and cases such as *Campbell v. City of Haverhill*, 155 U.S. 610, 15 S.Ct. 217 (1895). At that time there was no period of limitation within the federal patent laws and the Court therefore applied local law. That result obtained despite the contention that the underlying cause of action was created by Congressional legislation, was enforceable only in the federal courts and therefore should be governed by a federal judicially created period of limitations.

The procedure of borrowing local limitations periods became firmly established in following decisions of this Court.

"If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive. [citation] The rub comes when Congress is silent. Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation.

[citations]. *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582 (1946).¹

The application of state statutes of limitations to federal causes of action is frequently made by this Court. In *International U., U.A., A&A.I.W. v. Hoosier C. Corp.*, 383 U.S. 696, 86 S.Ct. 1107 (1966) (*Auto Workers*, hereinafter). This Court was confronted with an action brought against an employer under the Labor Management Relations Act (29 U.S.C. § 185). Indiana, the forum state, had no similar labor management relations act of its own to which this Court could look to borrow a limitation period. Hence, it was necessary for the Court to characterize the action for the purpose of selecting the appropriate state period. The cause of action was found to be,

"[E]ssentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement. Such an action closely resembles an action for breach of contract cognizable at common law. *Auto Workers, supra*, at 705. [emphasis added]

This and following cases establish a three-pronged test to be administered by federal courts. First, if a state statute exists which confers the same rights as the federal statute, that state statute will be applied. Second, if there is no state statute directly on point, the court must characterize the federal cause of action and apply the most analogous state statute. Third, the state statute thus

¹ The *Holmberg* decision engrafted the sole exception to this universally recognized rule. Where the state statute of limitations acts to defeat the policy or intent of Congress, it may be ignored. That is not in issue herein.

borrowed must be examined to see if it defeats the Congressional policy or intent of the legislation.

The reasoning and appropriateness of this test was reaffirmed in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 463, 95 S.Ct. 1716 (1975). The Court stated,

"In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.

There is nothing anomalous or novel about this. State law has been followed in a variety of cases that raised questions concerning the overtones and details of application of the State limitation period to the federal cause of action. [citations] Nor is there anything peculiar to a federal civil rights action that would justify special reluctance in applying state law. Indeed, the express terms of 42 U.S.C. § 1988 suggest that the contrary is true." [emphasis added]

The same issue came up again in *Runyon v. McCray*, U.S., 96 S.Ct. 2586 (1976). In that case the question was raised concerning the applicable statute of limitations to a 42 U.S.C. § 1981 school discrimination case. In applying the first of the three-pronged test, This Court found that Virginia had not enacted a statute that specifically governed civil rights suits. Therefore, it was necessary to characterize the federal claim to determine what the most analogous state claim would be. The Court found that the claim was for injury to their persons and therefore the Virginia statute stating "Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued," was applied. This application was made despite the con-

tention that a longer "catch all" statute arguably could apply.²

The case at bar is very similar to the *Runyon* case. Plaintiff herein seeks money damages for a denial of his civil rights resulting from his false arrest and physical injuries received during that arrest. The State of Illinois has no statute of limitations specifically governing civil rights suits. Therefore, the local federal courts were required to characterize the cause of action pursuant to the three-pronged test. The local District Judge did characterize the plaintiff's claims as being essentially an action for damages caused by an alleged false arrest and infliction of physical injuries. Such actions closely resemble actions cognizable at common law within the State of Illinois. Thus characterized, Ch. 83 § 15 *Ill. Rev. Stat.* (1975) clearly applied and was applied by the District Judge.³

² This Court made special note that the petitioner had failed to establish his tenuous claim that "personal injuries" means only "physical injuries." A similar argument was made by Respondent below.

³ No less than thirteen different District Judges of the Northern District of Illinois, Eastern Division, have made a similar characterization and applied Ch. 83 15 *Ill. Rev. Stat.* to civil rights actions. These thirteen judges have applied this statute in an unknown total number of cases. See *Cage v. Bitoy*, 406 F. Supp. 1220 (N.D. Ill. 1976, Marshall, J.), *Klein v. Springborn*, 327 F. Supp. 1289 (N.D. Ill. 1971, Robson, J.), *Skripits v. Skala*, 314 F. Supp. 510 (Marovitz, J.), *Williams v. Segroves*, 74 C 3714 (Flaum, J.), *Dixon v. Duncan*, 75 C 2989 (McGarr, J.), *Panko v. Tagliere*, 75 C 442 (Will, J.) *Edmonds v. Kulak*, 75 C 2451 (Perry, J.), *Johnson v. King*, 75 C 3786 (Marshall, J.), *Woodson v. Cullen*, 76 C 53 (Austin, J.), *Castelli v. City of Highwood*, 76 C 37 (Grady, J.), *Bauman v. Flynn*, 76 C 3724 (Crowley, J.), *Rios v. City of Chicago*, 76 C 3767 (Decker, J.), *Wand v. Harris*, 75 C 216 (Leighton, J.), and *Beard v. Robinson*, 75 C 3204 (Hoffman, J.).

"Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction, or for seduction, or for criminal conversation, shall be commenced within two years next after the cause of action accrued."

The United States Court of Appeals reversed the District Court which sits in Illinois and held that the Illinois "catch all" statute applied. While the Seventh Circuit paid lip service to applying the second prong of the test, it did not and it thereby acted contrary to the law established in *Auto Workers, Johnson*, and *Runyon, supra*.

The justifications used by the Seventh Circuit for avoiding the analogous state statute were (1) the desirability for uniformity of statute of limitations and (2) that civil rights violations are more serious than common law torts therefore deserving a different limitation period. As to the first claim the Circuit Court concluded that

"[b]y following the *Wakat*⁴ approach of applying a uniform statute of limitations, we avoid the often strained process of characterizing civil rights claims as common law torts. . . ." *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977)

The effect of this decision is that the inquiry required by the second prong of the test can be obviated by simply ignoring the problem and treating all civil rights actions as the same for the purpose of borrowing the state period of limitations. This is in direct conflict with the approach required by this Court in *Johnson*, *Runyon*, and *Auto Workers, supra*. Particularly noteworthy is the Court's rejection of that suggestion when it held that,

⁴ *Wakat v. Harlib*, 253 F.2d 59 (7th Cir. 1958).

"although a uniform limitation provision for § 301 suits might well constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon us . . . [W]e need only notice that lack of uniformity in limitations provisions is unlikely to have substantial effect upon the private definition or effectuation of 'substantive' or 'primary' rights in the collective bargaining process.

That Congress did not provide a uniform limitations provision for § 301 suits is not an argument for judicially creating one, unless we ignore the context of this legislative omission." *Auto Workers, supra*, at p. 702-03.

The second reason given by the Court of Appeals is also in derogation of this Court's earlier findings. The suggestion that civil rights violations are more serious than common law torts thus deserving a different (longer) statute of limitations was considered and rejected in *Johnson, supra*.

"Nor is there anything peculiar to a federal civil rights action that would justify special reluctance in applying state law. Indeed, the express terms of 42 U.S.C. § 1988 suggest that the contrary is true." *Johnson* at 464.

In fact, the evils suggested to exist by the Court of Appeals in *Beard*, can be wholly eliminated by applying the three-pronged test. Were that done, both a 42 U.S.C. § 1983 and a similar *Bivens*⁶ action would be treated the same, relative to a borrowed limitation period. In the case at bar, the Court of Appeals erred in its refusal to apply the tests enunciated in *Johnson, Auto Workers, and Runyon, supra*.

⁶ *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 338 (1971).

In District Courts within the United States Court of Appeals for the Seventh Circuit, judges have labored under the burden of having an early case, *Wakat v. Harlib, supra*, imply a five year statute of limitations based on Ch. 83 § 16 *Ill. Rev. Stat.*, the state "catch all" statute. A later case, *Jones v. Jones*, 410 F.2d 365 (7th Cir. 1969) *cert. denied* 396 U.S. 1013 (1970) held that federal courts were to apply the most analogous state statute which in the case at bar would be Ch. 83 § 15, or a two-year statute of limitations for injuries to the person. While some cases within the Circuit appeared to follow *Wakat*, the vast majority have followed *Jones*. In fact, the Court of Appeals has followed *Jones*, to the extent of affirming the dismissal of a case decided *solely* on the application of Ch. 83 § 15, *Edmonds v. Kulak*, 75 C 2451 (N.D. Ill.) *aff'd* 544 F.2d 520 (7th Cir. 1976) and two cases based partially on the application of the same statute *Munzer v. Department of Health*, 76 C 473 (N.D. Ill.) *aff'd* 558 F.2d 1034 (7th Cir. 1977), *Panko v. Tagliere*, 75 C 442 (N.D. Ill.) *aff'd* 535 F.2d 1258.⁶ In fact, in a published opinion issued by the Court of Appeals only the year before the overruling of *Jones*, the court held,

"Section 1983 contains no limitation provision. Courts, therefore, apply the time bar used by the forum state for similar torts." *Hill v. Trustees of Indiana University*, 537 F.2d 248 (7th Cir. 1976)

Hill must now be considered to have been overruled without comment by *Beard*. As set forth earlier, no less than thirteen District Judges in the Northern District

⁶ These affirmances were by way of unpublished orders pursuant to Circuit Rule 35. Such affirmance implied the application of a controlling statute (Rule 35(c)(2)(B)), and acceptance of existing law (Rules 35(c)(1)(i) and (c)(1)(ii)). Circuit Rule 35 is set forth in Appendix D.

of Illinois have applied the three-pronged test in an unknown number of cases.

Until the Court of Appeals overruled *Jones*, the Seventh Circuit and the District Court for the Northern District were following the tests required by decisions of this Court. It appears to be happenstance that the Court of Appeals was doing so as it rarely made reference to the decisions of this Court in reaching that result. The local District Courts, which sit exclusively in Chicago, Illinois and have repeated occasions to refer to local law, have applied the tests for purposes of adopting analogous state law in the vast majority of the cases.⁷

The Opinion of the Court of Appeals in *Beard* makes no effort, whatever, to take the decision of this Court into consideration in arriving at its result. Rather, it offers justifications which have been specifically rejected by this Court in earlier cases. The decision is erroneous and must therefore be reversed.

B.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN DIRECT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

One of the reasons the Court of Appeals gave in overruling *Jones* (and inferentially refusing to follow *Auto Workers*, *Johnson*, and *Rumyon, supra*), was that only one Circuit Court of Appeals looked to the analogous state

⁷ Two District Judges apparently felt compelled to follow *Wakat: Amen v. Crimmins*, 379 F. Supp. 777 (N.D. Ill. 1974) and *Holmes v. Silver Cross Hospital of Joliet, Illinois*, 340 F. Supp. 125 (N.D. Ill. 1972).

tort law. A reading of the reported cases will demonstrate that finding to be somewhat of a misstatement of the law as the First, Third, Fourth, Fifth, Eighth and Tenth Circuit Courts of Appeals follow the *Auto Workers* test.

A brief review of the decisions of the Circuit Court of Appeals reveals that only the Second and Ninth Circuits follow the practice now adopted by the Seventh Circuit. The First Circuit has recently held that,

“[A]dditionally, civil rights actions have been considered to state a cause of action lying in tort rather than contract.” *Gonzalez v. Santiago*, 550 F.2d 687 (1st Cir. 1977)

In that case founded upon a political firing issue the First Circuit relied upon *Johnson, supra* and applied the analogous tort statute of limitations. The Third Circuit follows the same procedure and applies the applicable state law for analogous state tort actions, *Ammlung v. City of Chester*, 494 F.2d 811 (3rd Cir. 1974). *Howell v. Cataldi*, 464 F.2d 272 (3rd Cir. 1972) stated,

“[h]ad this action been brought by plaintiff as a tort action in the Pennsylvania courts, as to these defendants, it would have been barred by the applicable statute of limitations.”

The state tort period of limitations was applied. To the same effect see *Read v. Local Lodge 1284, Intern. Ass'n. of Machinists & Aerospace Workers, AFL-CIO*, 528 F.2d F.2d 823 (3rd Cir. 1975). *Meyers v. Pennypack Woods Home Ownership Assn.*, 559 F.2d 894 (3rd Cir. 1977) applied a statute other than the one for “personal injuries” when a housing discrimination claim was made. The state statute for contracts was deemed most appropriate. The court held that each aspect of the complaint

will be given a separate statute of limitations depending upon the acts alleged, just as would be the case in state court.

The Fourth Circuit regularly applies the state two-year statute for "every action for personal injuries," *Ruynon, supra*, *Allen v. Gifford*, 462 F.2d 615 (4th Cir. 1972), *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976) *cert. den.* 429 U.S. 970, *Almond v. Kent*, 459 F.2d 200 (4th Cir. 1972). It is interesting to note that the Illinois period of limitations for every action for personal injuries is two years, Ch. 83 § 15. The Fourth Circuit concluded that a civil rights action was more akin to a claim for damages for personal injuries than just torts. Such a finding demonstrates that the court applied the three-pronged test. Unlike Virginia, in Illinois the period of limitations for personal injuries and the relevant torts are the same; therefore, its application would have been assured in the Fourth Circuit.

The Fifth Circuit has probably confronted this issue more than any other circuit. It strictly follows the three-step test in all recent cases.⁸ *Shaw v. McCorkle*, 537 F.2d 1289 (5th Cir. 1976) held that the period of limitations is that which would apply to a similar case brought in state court. See, *Page v. U.S. Industries, Inc.*, 556 F.2d

⁸ Two maverick Fifth Circuit cases, *White v. Padgett*, 475 F.2d 79 (5th Cir.) *cert. den.* 414 U.S. 861 (1973) and *Nevels v. Wilson*, 423 F.2d 691 (5th Cir. 1970), adopted the approach taken by the Second and Ninth Circuits. They cited no Fifth Circuit authority and apparently were unaware of the earlier holdings in *Beard v. Stephens*, 372 F.2d 685 (5th Cir. 1967) and *Shank v. Spurill*, 456 F.2d 756 (5th Cir. 1969). No cases before or since adopt their approach and they must be considered as having been overruled.

346 (5th Cir. 1977) *reh. den.* (Oct. 10, 1977), *Ingram v. Steven Robert Corp.*, 547 F.2d 1260 (5th Cir. 1977), *Shelley v. Bayou Metals*, 561 F.2d 1209 (5th Cir. 1977), *Proctor v. Flex*, 567 F.2d 635 (5th Cir. 1978), *Franks v. Bowman Trans. Co.*, 495 F.2d 398 (5th Cir.) *cert. den.* 419 U.S. 1050. The Fifth Circuit also has had the opportunity to interpose the third test of evaluating the state law to determine whether it acts to defeat Congressional policy in *Franklin v. City of Marks*, 439 F.2d 665 (5th Cir. 1971). The applicable state statute of limitations was ten days but the court found that to be unduly restrictive.

"Here the essential nature of the wrongs complained of is the abuse of the municipal procedure for establishing corporate limits."

* * *

In state law there is no real analogy to these wrongs." As a result the court was required to rely upon the state "catch all" statute.

The Sixth Circuit also looks to apply analogous state law. *E.E.O.C. v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975) was a Title VII and 42 U.S.C. § 1981 employment discrimination case. The court stated that "the deprivation of civil rights is a wrong to the person" and applied the Michigan statute for an "action to recover damages for injuries to persons or property. *Austin v. Brammer*, 555 F.2d 142 (6th Cir. 1977) involved 42 U.S.C. §§ 1983 and 1985 allegations concerning a false arrest, giving perjured testimony and conspiracy. The court applied the Ohio statute for false arrest and false imprisonment, they being the most nearly analogous. See also *Madison v. Wood*, 410 F.2d 564 (6th Cir. 1969), *Buhalino*

v. Michigan Bell Tel. Co., 404 F.2d 1023 (6th Cir. 1968),
Mulligan v. Schacter, 389 F.2d 231 (6th Cir. 1968).⁹

Peterson v. Fink, 515 F.2d 815 (8th Cir. 1975) held that the applicable statute is determined by reviewing the case as if it were filed in state court and under state law. *Green v. McDonnell Douglas Corp.*, 463 F.2d 337 (8th Cir. 1972), a 42 U.S.C. § 1981 employment discrimination case, applied the state law for contracts, it being the most analogous. *Reed v. Hutto*, 486 F.2d 534 (8th Cir. 1973) was confronted with a one-year statute for an assault and battery, a three-year statute for contract or liability expressed or implied and a five-year catch all. Plaintiff was suing for injuries sustained in jail and the court found the three year statute applicable. The reason was that the gist of plaintiff's claim was negligent administration of the jail, not assault and battery.

Savage v. U.S., 450 F.2d 449 (8th Cir. 1971) *cert. den.* 405 U.S. 1043 dealt with allegations of an indictment having been returned on knowingly false information. The court applied the state statute dealing with defamation and malicious prosecution. *Johnson v. Dailey*, 479 F.2d 86 (8th Cir.) *cert. den.* 414 U.S. 1009 relied upon *Savage, supra*, in applying a two year statute for personal injuries rather than the five year catch all. *Chambers v. Omaha Public School Dist.*, 536 F.2d 222 (8th Cir. 1976)

⁹ *Garner v. Stephens*, 460 F.2d 1144 (6th Cir. 1972) and *Mason v. Owens-Illinois*, 517 F.2d 520 (6th Cir. 1975), are in conflict at first blush. However, a more careful reading of those cases reveals that step three of the test required the court to abandon a 90 day, and one year state statute as being inapposite. The reason was that they related to administrative actions, not court actions. A very peculiar state of the law in Kentucky bore on the outcome of *Garner*. See p. 1146.

applied the first test as there was a directly applicable state statute for federal claims. *Warren v. Norman Realty Co.*, 513 F.2d 73 (8th Cir. 1975) *cert. den.* 423 U.S. 855, a 42 U.S.C 3601 Housing discrimination case, succinctly held,

"The ultimate goal is to apply the same statute of limitations period to the federal civil rights action as would be applied if a similar action were brought in state court."

Consequently, the court applied a 180 day state statute which was directly applicable.¹⁰

The Tenth Circuit applied the state statute for injuries to the rights of another in *Crosswhite v. Brown*, 424 F.2d 495 (10th Cir. 1970). That Circuit also applied the state tort period of limitations to an invasion of privacy claim based upon the giving of allegedly misleading information concerning plaintiff's morals in *Polin v. Dun and Bradstreet, Inc.*, 511 F.2d 875 (10th Cir. 1975).

The only Circuits holding to the contrary are the Second and Ninth Circuits. While these cases purport

¹⁰ *Glasscoe v. Howell*, 431 F.2d 863 (8th Cir. 1970) was one of the first Eighth Circuit cases to confront this issue. It rejected the applicable tort statute and found it unnecessary to decide between the "catch all" and the statute for claims based on statutory liability. The later Eighth Circuit cases have not followed this approach. Another Eighth Circuit case *Clark v. Mann*, 562 F.2d 1104 (8th Cir. 1977) began by acknowledging that the most analogous state statute must be applied but was confronted with a three year statute for a contract or liability express or implied and statutory causes of action, a five year catch all, and a five year written contracts statute. The last clearly did not apply to the employment discrimination case, the court rejected the catch all and therefore was left with the shortest statute by process of elimination.

to follow the three-prong test, they, in fact, ignore it. For example, *Swan v. Bd. of Education of the City of New York*, 319 F.2d 56 (2nd Cir. 1963) resolutely holds

“the applicable period of limitations is that which New York would enforce had an action seeking *similar* relief been brought in a court of that state.” [emphasis added]

The case then proceeds to make no analysis of the federal cause of action to determine the nature of the “similar” state claim but mechanically applies the state statute for actions to recover upon a liability created by statute. The rationale offered is that the adopted state law applies to actions created by statute and the Civil Rights Act is a statute. The court simply refused to determine what form a state action “seeking similar relief” would take despite their admission that it is required under the law.

The Ninth Circuit regularly applies the same procedure of reciting the appropriate test but ignoring its application. *Briley v. State of California*, 564 F.2d 849 (9th Cir. 1977) dutifully sets forth the test.

“Since § 1983 does not itself contain a limitation period, the federal courts look to the state statute of limitations applicable to the *most similar state cause of action*.” [emphasis added]

As the Second Circuit does, after announcing the applicable law, the Ninth Circuit makes no analysis of the form that such a “similar state cause of action” would take. Rather, it mechanically applies the period for acts upon a liability created by statute. The rule is announced as if it is to be applied but then is ignored. The Second and Ninth Circuit opinions are in direct conflict with *Auto Workers*, *Johnson*, and *Runyon* and are in conflict with the vast majority of the remaining Circuit Courts of Appeals.

CONCLUSION

The United States Court of Appeals for the Seventh Circuit has decided a question of federal law in conflict with decisions of this Court. In addition, the decision in the case at bar is in direct conflict with decisions from most other circuits on an important question of federal law. This question ought to be decided by the Court. For these reasons the Writ of Certiorari should be granted to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Submitted November 11, 1977
November 16, 1977)

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

MIKEL J. WAND,

Plaintiff-Appellant,
No. 77-1510 *vs.*

JOE HARRIS and WILLIE REEVES,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 75-C-216

JUDGE LEIGHTON

This matter comes before the court on the "MEMORANDUM" filed herein on October 28, 1977 by counsel for the plaintiff-appellant; and the "APPELLEE'S RESPONSE TO COURT'S ORDER OF OCTOBER 26, 1977" filed herein on November 9, 1977 by counsel for the defendant-appellee Willie Reeves. Both documents were filed pursuant to this court's order of October 26, 1977.

The district court found that plaintiff-appellant's suit brought under 42 U.S.C. § 1983 was time-barred by the Illinois two-year statute of limitations, Ill. Rev. Stat. ch. 83, § 15 (1977), and dismissed the action on March 22, 1977. The question of the appropriate Illinois statute of limitations to be applied to statutory claims brought under the Civil Rights Act has since been held to be

the five-year statute, ILL. REV. STAT. ch. 83, § 16 (1977). *Beard v. Robinson*, Slip Op. No. 76-1708 (7th Cir. Sept. 28, 1977). As appears from the record, plaintiff-appellant's complaint was filed within five years of the alleged violation of his civil rights. Accordingly,

IT IS ORDERED that judgment appealed from be, in light of *Beard*, REVERSED, and the cause is hereby REMANDED for further proceedings according to law. The clerk is directed to enter judgment accordingly.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 16, 1977)

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

MIKEL J. WAND,

Plaintiff-Appellant.

No. 77-1510 vs.

JOE HARRIS and WILLIE REEVES,
Defendants-Appellees.

No. 75-C-216

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, **REVERSED**, with costs, and the cause is hereby **REMANDED** for further proceedings according to law, in accordance with the order of this court entered this date.

APPENDIX B

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

ELOISE BEARD, as Administratrix for the Estate of Jeff Beard, the Deceased,

Plaintiff-Appellant.

v.

STANLEY B. ROBINSON, ROY MARTIN MITCHELL, and Certain Officers of the Federal Bureau of Investigation, whose true identities are unknown to the plaintiff.

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 75 C3204—JULIUS J. HOFFMAN, *Judge.*

ARGUED FEBRUARY 8, 1977—DECIDED SEPTEMBER 28, 1977

Before BAUER, WOOD, *Circuit Judges*, and SHARP, *District Judge*.*

BAUER, *Circuit Judge*. In this appeal we must determine whether damage claims brought against a state officer under the Civil Rights Acts, 42 U.S.C. § 1981, *et seq.*, and against federal officers under the Fourth Amendment survive the death of the injured party, and

* The Hon. Allen Sharp, United States District Court for the Northern District of Indiana, is sitting by designation.

whether the claims are time-barred. The district court held that some of the claims did not survive the death of the injured party and that the other claims were time-barred. We reverse.

Plaintiff Eloise Beard brought this action in the district court as administratrix of the Estate of Jeff Beard, who allegedly was murdered by the defendants. Plaintiff sued Stanley Robinson, a Chicago policeman at the time of the events underlying the suit, under the Civil Rights Acts, 42 U.S.C. § 1981, *et seq.*, and the other defendants, Federal Bureau of Investigation personnel, under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The complaint alleges that the defendants conspired to deprive, and actually deprived, Jeff Beard of his constitutional rights in the course of an FBI investigation into corruption among members of the Chicago Police Department. As part of the investigation, the FBI purportedly employed defendant William O'Neal to covertly gather information about the Department by engaging in criminal acts with Robinson and others. Defendant Roy Mitchell served as O'Neal's FBI contact. With the assistance of Mitchell and other unknown FBI agents, Robinson and O'Neal allegedly planned and committed Jeff Beard's murder on or about May 17, 1972, when they seized Beard in Chicago under the pretext that they had a warrant for his arrest; searched and handcuffed him, and drove him to Indiana, where Robinson clubbed and shot him to death. No warrant for Beard's arrest ever existed. The complaint, filed on September 25, 1972, seeks both compensatory and punitive damages from the defendants for violating Beard's rights under the Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the Constitution.

Upon motion of the defendants, the district court dismissed the complaint. The court reasoned that our decision in *Spence v. Staras*, 507 F.2d 554, 557 (7th Cir. 1974), mandates that federal civil rights actions survive for the benefit of an injured party's estate only to the extent that the applicable state law permits such claims to sur-

vive. Looking to the Illinois Survival Act, Ill. Rev. Stat. ch. 3, § 339¹ the court concluded that the instant claims survived only insofar as they sought damages for the physical injuries Beard suffered. Relying on *Jones v. Jones*, 410 F.2d 365 (7th Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970), the court then dismissed the action altogether because the physical injury claims were barred by Illinois's two-year statute of limitations. Ill. Rev. Stat. ch. 83, § 15.

II.

Survival

We turn first to the question of whether the claims alleged survive Beard's death. Plaintiff presents several theories for the survival of her action. She argues that the action as a whole survives (1) under the Illinois Survival Act, both as an action to recover damages for "injur[ies] to the person" and as an action "against officers for misfeasance, malfeasance, or nonfeasance"; (2) under Illinois common law; and (3) under federal common law. We hold, as a matter of federal law, that under Illinois law the action survives "against officers for misfeasance, malfeasance or nonfeasance" and thus need not consider plaintiff's other arguments.

Neither the Civil Rights Acts nor the Supreme Court's decision in *Bivens* speaks to the abatement or survival of

¹ Ill. Rev. Stat. ch. 3, § 339 provides:

"In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander or libel), actions to recover damages for an injury to real or personal property, actions against officers for misfeasance, malfeasance, or nonfeasance of themselves or their deputies, actions for fraud or deceit, and actions provided in Section 14 of Article VI of 'An Act relating to alcoholic liquors', approved January 31, 1934 as amended."

actions brought thereunder. Faced with the absence of a governing federal rule of decision, most courts that have considered the question of the survival of federal civil rights claims have looked to state law, either on the authority of 42 U.S.C. § 1988² or simply because reference to state law obviated the need to fashion an independent federal common law rule. E.g., *Spence v. Staras*, 507 F.2d 554, 557 (7th Cir. 1974); *Hall v. Wooten*, 506 F.2d 564 (6th Cir. 1974); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961); *Pritchard v. Smith*, 289 F.2d 153 (8th Cir. 1961). At least one court has found it necessary to fashion an independent federal common law rule when state law, which would have defeated the survival of the federal claim, was deemed inconsistent with the strong federal policy of insuring the survival of federal remedies for violations of federal civil rights. *Shaw v. Garrison*, 545 F.2d 980 (5th Cir. 1977).

Because we believe the borrowing of state law in the circumstances of this case is completely consistent with

² 42 U.S.C. § 1988 provides in pertinent part:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

the federal policies underlying *Bivens* and the Civil Rights Acts, we have no occasion to fashion an independent federal common law rule here. With respect to plaintiff's civil rights claims, 42 U.S.C. § 1988 authorizes our reference to state law insofar as it is "not inconsistent with the Constitution and laws of the United States." With respect to plaintiff's *Bivens* claim, the adoption of state law likewise seems warranted since it is consistent with the federal policies underlying *Bivens*.³

The applicable Illinois law that we adopt as the governing federal rule is found in the Illinois Survival Act, Ill. Rev. Stat. ch. 3, § 339, which provides:

"In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property or for the detention or conversion of personal property, actions against officers for misfeasance, malfeasance, or nonfeasance of themselves or their deputies, actions for fraud or deceit, and actions provided in Section 14 of Article VI of 'An Act relating to alcoholic liquors', approved January 31, 1934 as amended."

In view of the Illinois Supreme Court's declaration that this act is "remedial in its nature and is to be liberally construed." *McDaniel v. Bullard*, 34 Ill. 2d 487, 491, 216 N.E.2d 140, 143 (1966), we believe the district court erred in relying on *Kent v. Muscarello*, 9 Ill. App. 3d

³ State survival statutes commonly have been adopted as a matter of federal law for application to other federal causes of action for which there is no federal rule regarding abatement or survival. E.g., *Cox v. Roth*, 348 U.S. 207 (1955) (Jones Act); *Just v. Chambers*, 312 U.S. 383 (1941) (admiralty tort); *Van Breeck v. Sabine Towing Co.*, 300 U.S. 342 (1937) (Merchant Marine Act). See also the other cases cited in *Brazier v. Cherry*, *supra*, and *Pritchard v. Smith*, *supra*.

738, 293 N.E.2d 6 (2d Dist. 1973), for the proposition that this action does not survive as an action "against officers for misfeasance, malfeasance, or nonfeasance of themselves or their deputies." To be sure, *Kent* held that a malicious prosecution action against two Barrington, Illinois policemen did not survive the death of the injured party. *Kent*'s holding that the policemen were not "officers" for the purposes of the Illinois Survival Act, however, was based on the fact that the policemen were not deemed "officers" at common law, by statute or by municipal ordinance. For the latter proposition, *Kent* relied on *Krawiec v. Industrial Commission*, 372 Ill. 560, 564, 25 N.E.2d 27 (1939), which held that policemen of the City of Chicago Heights, Illinois were not made officers of the City by municipal ordinance and thus were entitled to recover under the Illinois Workmen's Compensation Act. However, *Krawiec* itself distinguished *City of Chicago v. Industrial Commission*, 291 Ill. 23, 125 N.E. 705 (1920), which held that City of Chicago policemen were made officers by city ordinances and thus were not entitled to workmen's compensation benefits. Since *City of Chicago* has not been overruled by the Illinois Supreme Court and thus still stands for the proposition that Chicago policemen are officers of the City, we feel compelled to follow *City of Chicago* and hold that Chicago policemen are also "officers" for purposes of the Illinois Survival Act. Accordingly, we hold that the instant action brought against defendant Robinson, sued in his capacity as a Chicago policeman, survives Beard's death. See *Holmes v. Silver Cross Hospital of Joliet, Illinois*, 340 F. Supp. 125, 129 (N.D. Ill. 1972).

Moreover, inasmuch as FBI agents are deemed federal officers under federal law, see *Lowenstein v. Rooney*, 401 F. Supp. 952, 960-62 (E.D.N.Y. 1975), we believe that plaintiff's *Bivens* action also can be characterized as an action "against officers" within the meaning of the Illinois Survival Act. Accordingly, adopting as federal law the Illinois Survival Act, we hold that plaintiff's *Bivens* action against the federal defendants survives as well.

III.

Statute of Limitations

Neither the Civil Rights Acts nor *Bivens* fixes a time limit within which suits brought thereunder must be commenced. As to plaintiff's civil rights claims, however, precedents establish that the applicable limitations period is that which a court of the State where the federal court sits would apply had the action been brought there. *O'Sullivan v. Felix*, 233 U.S. 318 (1914); *Duncan v. Nelson*, 466 F.2d 939, 941 (7th Cir.), cert. denied, 409 U.S. 894 (1972); see 42 U.S.C. § 1988. Hence, we look to Illinois law to determine the statute of limitations applicable to defendant Robinson.

As to plaintiff's *Bivens* claims, the parties to this action agree that the applicable limitations period is that which would govern an analogous action brought in a court of the forum state. *Regan v. Sullivan*, 417 F. Supp. 399 (E.D.N.Y. 1976); *Lombard v. Board of Education of the City of New York*, 407 F. Supp. 1166, 1171 (E.D.N.Y. 1976), rev'd on other grounds, 502 F.2d 631 (2d Cir. 1974); *Ervin v. Lanier*, 404 F. Supp. 15, 20 (E.D.N.Y. 1975); see *Fine v. City of New York*, 529 F.2d 70, 76-77 (2d Cir. 1975). Accordingly, we will also look to Illinois law to determine the statute of limitations applicable to the federal defendants. We note, however, that our borrowing of state limitations periods to determine the timeliness of both these claims is conditioned on the state limitations period being consistent with the policies underlying the federal rights of action. *Occidental Life Insurance Co. v. EEOC*, 45 U.S.L.W. 4752, 4755 (June 20, 1977); see 42 U.S.C. § 1988.

Although the parties agree that we should look to Illinois law to determine the applicable statute of limitations, they disagree as to which Illinois statute of limitations should be applied. The plaintiff, relying on *Wakat v. Harlib*, 253 F.2d 59 (7th Cir. 1958), argues that Illinois's five-year statute of limitations governing "all civil actions not otherwise provided for" by the

Illinois Limitations Act, Ill. Rev. Stat. ch. 83, § 16,⁴ governs both her claims. Plaintiff notes that under Illinois law, this limitations period applies to causes of action created by statute, *Blakeslee's Storage Warehouses v. City of Chicago*, 369 Ill. 480, 17 N.E.2d 1, 4 (1938); *Parmalee v. Price*, 208 Ill. 544, 70 N.E. 725 (1904); *Gibraltar Ins. Co. v. Varkalis*, 115 Ill. App. 2d 130, 253 N.E.2d 605, 608-09 (1969), *aff'd*, 46 Ill. 2d 481, 263 N.E. 2d 823 (1970); *Lyons v. Morgan County*, 313 Ill. App. 296, 40 N.E.2d 103 (1942), and that the action created by the Civil Rights Acts is such a cause of action. The same statute of limitations should govern the claims brought against the federal officers, says plaintiff, because the *Bivens* action is analogous to actions brought under the Civil Rights Acts, and it would be incongruous to apply a different limitations period to such actions merely because federal rather than state officers are being sued.

The defendants, relying on *Jones v. Jones*, 410 F.2d 365 (7th Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970), argue that Illinois's two-year statute of limitations for "injur[ies] to the person, false imprisonment, and abduction," Ill. Rev. Stat. ch. 83, § 15,⁵ should be applied

⁴ Ill. Rev. Stat. ch. 83, § 16 provides:

"Except as provided in Section 2-725 of the 'Uniform Commercial Code', approved July 31, 1961, as amended, and Section 11-13 of 'the Illinois Public Aid Code', approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years after the cause of action accrued."

⁵ Ill. Rev. Stat. ch. 83, § 15 provides:

"Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction, or for seduction, or for criminal conversion, shall be commenced within two years next after the cause of action accrued."

to plaintiff's civil rights claims because the actions governed by this statute are the substantive offenses that most closely resemble the misconduct in which the defendants here are alleged to have engaged. With respect to the *Bivens* action, defendants contend that the two-year limitations period should also govern because (1) *Bivens* actions are not based upon a statutory liability like civil rights actions, but are actions to redress "constitutional torts," and (2) the two-year statute of limitations governing the instant civil rights claims should be applied to the analogous *Bivens* claims as well.

We turn first to the question of which state statute of limitations period applies to plaintiff's statutory civil rights claims and confess at the outset that the state of the law in this Circuit regarding the limitations period applicable to claims brought under federal civil rights acts is less than lucid.

In *Wakat v. Harlib*, *supra*, the plaintiff sued several Chicago police officers who arrested him without a warrant or probable cause and detained him six days without charging him with a crime, without allowing him to see an attorney, and without allowing him to appear before a judge for a bail hearing. The officers also coerced him into signing a confession later used in court to convict him, searched his home and workplace and seized his personal property without a warrant or probable cause. The plaintiff's action was based on 42 U.S.C. 1983 and 1985, and we held his claims were governed by Illinois's five-year statute of limitations covering causes of action created by statute. Subsequently, *Wakat*'s holding was followed or cited without disapproval in at least the following cases: *Inada v. Sullivan*, 523 F.2d 485 (7th Cir. 1975); *Duncan v. Nelson*, 466 F.2d 939, 941 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972); *Rinehart v. Locke*, 454 F.2d 313, 315 (7th Cir. 1971); *Weber v. Consumers Digest, Inc.*, 440 F.2d 729, 731 (7th Cir. 1971); *Baker v. F. & F. Investment*, 420 F.2d 1191, 1197 (7th Cir.), *cert.*

denied, 400 U.S. 821 (1970); *Amen v. Crimmins*, 379 F. Supp. 777, 779 (N.D. Ill. 1974); *Holmes v. Silver Cross Hospital of Joliet, Illinois*, 340 F. Supp. 125, 128 (N.D. Ill. 1972).

In *Jones v. Jones, supra*, however, we took a different tack toward the problem of ascertaining the applicable limitations period for federal civil rights claims. The *Jones* plaintiff had brought suit under 42 U.S.C. § 1983 against his ex-wife, members of her family, her lawyers, and judges of the Illinois Circuit and Appellate Courts for combining to deprive him of his constitutional rights in a series of court actions involving his ex-wife's claims for alimony and child support that ultimately resulted in his serving a jail term. After determining that the judges were immune from suit and that the lawyers could not be sued under the Civil Rights Acts because they were not acting under color of state law, we looked to "the substance of the alleged injury" to determine the applicable limitations period and held that the two-year statute of limitations contained in Ill. Rev. Stat. ch. 83, § 15 governed the action against the remaining defendants because the damages sought resulted from an injury to the plaintiff's person, false imprisonment, and malicious prosecution. We attempted to distinguish *Wakat* on the ground that the earlier case involved a conspiracy claim brought under 42 U.S.C. § 1985, rather than a Section 1983 claim. Subsequently, *Jones* was cited with approval in *Baker v. F. & F. Investment Co.*, 489 F.2d 829, 837 (7th Cir. 1973), and followed by at least three district courts in the Circuit. *Cage v. Bitoy*, 406 F. Supp. 1220 (N.D. Ill. 1976); *Klein v. Springborn*, 327 F. Supp. 1289, 1290 (N.D. Ill. 1971); *Skrapits v. Skala*, 314 F. Supp. 510 (N.D. Ill. 1970).

Upon reflection, it seems to us that *Wakat* and *Jones* cannot stand together, for underlying the inconsistent

results reached therein⁶ are two inconsistent approaches to determining the applicable statute of limitations. The *Wakat* approach treats all claims founded on the Civil Rights Acts as governed by the five-year Illinois statute of limitations applicable to all statutory causes of action that do not contain their own limitations periods. *Jones*, on the other hand, looks beyond the fact that a statutory cause of action has been alleged and seeks to characterize the facts underlying plaintiff's claim in terms of traditional common law torts for purposes of determining the applicable state statute of limitations. Faced with these two conflicting approaches that have generated inconsistent results within the Circuit, we now believe it is necessary to overrule *Jones* and adopt the *Wakat* rule as the law of the Circuit for the following reasons.*

We believe our choice of the *Wakat* rule is compelled by the fundamental differences between a civil rights action and a common law tort. The Civil Rights Acts do not create 'a body of general federal tort law.' *Paul v. Davis*, 424 U.S. 693, 701 (1976). Rather, they

* Apart from the *Jones* Court's failure to recognize that *Wakat* was based on 42 U.S.C. § 1983 as well as Section 1985 and thus could not be distinguished merely on that ground, *Wakat*'s reasoning could have been applied without strain to the *Jones* facts; the action brought by *Jones* under 42 U.S.C. § 1983 could just as well have been characterized as a statutory right of action governed by Illinois's five-year statute of limitations. Likewise, the damages *Wakat* sought arose from injuries that could have been characterized as injuries to his person, false imprisonment, and abduction, all mentioned in Ill. Rev. Stat. ch. 83, § 15.

* In view of our overruling *Jones*, the portions of this opinion relative to our holding have been circulated among all the judges of this Court in regular active service. No judge favored a rehearing en banc with respect to that holding. Judge Tone did not participate in the Court's action.

“creat[e] rights and impos[e] obligations different from any which would exist at common law in the absence of statute. A given state of facts may of course give rise to a cause of action under Section 1983, but the elements of the two are not the same. The elements of an action under Section 1983 are (1) the denial under color of state law (2) of a right secured by the Constitution and laws of the United States. Neither of these elements would be required to make out a cause of action in common-law tort; both might be present without creating common-law tort liability.” *Smith v. Cremins*, 308 F.2d 187, 190 (9th Cir. 1962) (footnote and citations omitted).

As Justice Harlan suggested with regard to the Civil Rights Acts,

“a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.” *Monroe v. Pape*, 365 U.S. 167, 194 (1961) (concurring opinion).

By following the *Wakat* approach of applying a uniform statute of limitations, we avoid the often strained process of characterizing civil rights claims as common law torts, and the

“[i]nconsistency and confusion [that] would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several different periods of limitation applicable to each state-created right were applied to the single federal cause of action.” *Smith v. Cremins*, *supra* at 190.

Moreover, we note that the *Wakat* approach of looking to a general state statute of limitations prevails in most of our sister circuits, while the *Jones* approach of looking to the underlying tort to determine the applicable state

statute of limitations has been followed consistently only by the Third Circuit.⁷

⁷ E.g., *Ammlung v. City of Chester*, 494 F.2d 811, 814 (3d Cir. 1974); *Howell v. Cataldi*, 464 F.2d 272, 277 (3d Cir. 1972). The Second and Ninth Circuits uniformly apply state limitation periods for statutory causes of action. E.g., *Rosenberg v. Martin*, 478 F.2d 520, 526 (2d Cir.), cert. denied, 414 U.S. 872 (1973); *Swan v. Bd. of Higher Education of the City of New York*, 319 F.2d 56, 60 (1963); *Donovan v. Reinbold*, 433 F.2d 738, 741-42 (9th Cir. 1970); *Smith v. Cremins*, 308 F.2d 187 (9th Cir. 1962). The Fourth Circuit, in cases arising out of Virginia, applies that State’s general limitations period for personal injuries rather than its shorter limitations period for intentional torts. That court reasons that a federal civil rights action is more serious than a common law tort and thus deserves a longer statute of limitations. *Almond v. Kent*, 459 F.2d 200, 203-04 (4th Cir. 1972) followed in *Runyon v. McCrary*, 427 U.S. 160, 179-82 (1976), and *Allen v. Gifford*, 462 F.2d 615 (4th Cir. 1972). There is a split in authority in the Fifth Circuit. Some cases apply state limitations periods for statutory actions. *White v. Padgett*, 475 F.2d 79, 85 (5th Cir.), cert. denied, 414 U.S. 861 (1973); *Franklin v. City of Marks*, 439 F.2d 665 (5th Cir. 1971); *Nevels v. Wilson*, 423 F.2d 691 (5th Cir. 1970). Others apply the state statute of limitations that would govern a common law action that could be brought in a state court upon the same facts. *Shaw v. McCorkle*, 537 F.2d 1289 (5th Cir. 1976); *Shank v. Spurill*, 406 F.2d 756 (5th Cir. 1969); *Beard v. Stephens*, 372 F.2d 685 (5th Cir. 1967). The most recent cases in the Sixth Circuit have applied state limitations periods for statutory actions. *Mason v. Owens-Illinois, Inc.*, 517 F.2d 520 (6th Cir. 1975); *Garner v. Stephens*, 460 F.2d 1144 (6th Cir. 1972). *Contra*, *Madison v. Wood*, 410 F.2d 564 (6th Cir. 1969); *Bufalino v. Michigan Bell Tel. Co.*, 404 F.2d 1023, 1028 (6th Cir. 1968); *Mulligan v. Schacter*, 389 F.2d 231 (6th Cir. 1968). In *Reed v. Hutto*, 486 F.2d 534 (8th Cir. 1973), the Eighth Circuit recognized the existence of a clear split in the circuit between the two methods of choosing an appropri-

We thus hold that the Illinois five-year statute of limitations applies to statutory claims brought under the Civil Rights Acts. *Jones v. Jones*, 410 F.2d 365 (7th Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970), is hereby overruled.

Turning to the *Bivens* claims, we recognize plaintiff's argument for application of the same statute of limitations that we apply to civil rights claims is a compelling one. A contrary result could lead to the incongruous application of inconsistent limitations periods to different members of a single conspiracy, based solely on whether an officer alleged to have committed the constitutional violation was employed by the state or federal government. Cf. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1346-47 (2d Cir. 1972) (immunity of state and federal officers). On the other hand, since *Bivens* actions are not creatures of statute, the state law rationale used above for application of the five-year statute of limitations is not appropriate to *Bivens* claims.

7 (Continued)

ate statute of limitations. Since *Reed*, the court has avoided the problem by applying state statutes of limitations, other than those for common law torts or for statutory actions, that "clearly apply" to civil rights actions. *Chambers v. Omaha Public School District*, 536 F.2d 222, 228 (8th Cir. 1976) (Nebraska statute of limitations applying to "actions upon a liability created by federal statute . . . for which . . . no period of limitations is provided in such statute." *Peterson v. Fink*, 515 F.2d 815 (8th Cir. 1975) (Missouri statute of limitations applying to actions against officers for liabilities incurred by official acts). The Tenth Circuit has applied general state statutes of limitations for "injuries to the rights or another not arising from a contract and not otherwise enumerated." *Crosswhite v. Brown*, 424 F.2d 495 (10th Cir. 1970); *Wilson v. Hinman*, 172 F.2d 914 (10th Cir.), *cert. denied*, 336 U.S. 970 (1949).

With these considerations in mind, we look to the Illinois statutes of limitations that we might apply. Again we are faced with a choice between the two-year limitations periods for torts in Ill. Rev. Stat. ch. 83 § 15, and the five-year limitations period for "actions not otherwise provided for" in Ill. Rev. Stat. ch. 83, § 16. We can eliminate the first choice for the same reasons we refused to apply the Illinois statute of limitations for torts to the state defendant here. Like civil rights claims, *Bivens* claims for the deprivation of constitutional rights cannot be equated with state tort claims. Both the elements of the two types of claims and the underlying rights asserted are distinctly different. *Regan v. Sullivan*, 417 F. Supp. 399, 403 (E.D.N.Y. 1976). The Supreme Court recognized these differences in *Bivens* itself:

"[A]s our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen." 403 U.S. at 392.

"The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against searches and seizures, may be inconsistent or even hostile." 403 U.S. at 394.

The only other applicable statute of limitations is the five-year catch-all period of limitations we applied to the instant civil rights claims. For those claims, we held that the five-year period applied because they were based on a liability created by statute, for which Illinois courts apply the five-year limitations period. For *Bivens* type claims, we think it inappropriate to apply the five-year statute of limitations on that basis, but apply that statute because no other Illinois statute of limitations can appropriately be applied. This conclusion is reinforced by the knowledge that an identical statute of

limitations period will be applied to all the defendants in this action, thus avoiding the inconsistent result of applying different statutes of limitations to defendants who are charged with engaging in a single conspiracy.

In summary, we hold that this survivors action may be brought by the plaintiff and that her claims are not time-barred. Accordingly, the district court's judgment is reversed and the case is remanded for further proceedings.

REVERSED and REMANDED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MIKEL J. WAND,

Plaintiff,

vs.

JOE HARRIS and WILLIE REEVES,

Defendants.

75 C 216

Before the Honorable GEORGE N. NEIGHTON
United States District Judge

MEMORANDUM ORDER

Plaintiff brings this civil rights action pursuant to 42 U.S.C. § 1983 charging that he was falsely arrested, beaten and battered on March 1, 1972 by defendants who were deputy sheriffs of Cook County. On October 5, 1976, defendant Willie Reeves filed a motion for summary judgment claiming, *inter alia*, that plaintiff's action was barred by the two year statute of limitations provided by state law. Ill. Rev. Stat. ch. 83, § 15. This court denied defendant's motion in this respect noting, however, that there was authority for defendant's position. See Memorandum Order dated December 28, 1976. After this court ruled on defendant's motion, Judge Decker issued a memorandum opinion, that I have attached as an appendix to this order, which is an exhaustive treatment of the issue raised in this case. The cause is before the court on defendant Reeves's motion for reconsideration.

This civil rights suit is predicated on acts which closely analogize state law theories governing false arrest and battery. In accordance with federal case law,

this court is obliged to find that the limitations period of the most closely analogous state action governs this federal civil rights suit. See *O'Sullivan v. Felix*, 233 U.S. 318 (1914); *Cage v. Bitoy*, 406 F. Supp. 1220 (N.D. Ill. 1976). After reconsideration of this issue and in light of the increasing support existing at the district court level that the two year limitations period applicable to personal injuries governs this type of action, this court finds that plaintiff's suit is barred by the expiration of the statute of limitations provided by Ill. Rev. Stat. ch. 83, §15, and orders that this suit be dismissed. See *Victor Rios et al. v. City of Chicago, et al.*, 76 C 3767 (N.D. Ill. Feb. 22, 1977); *Cage v. Bitoy*, 406 F. Supp. 1220 (N.D. Ill. 1976).

So ordered
George N. Leighton,
United States District Judge

Dated: March 18, 1977

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable George N. Leighton
Cause No. 75 C 216 Date 3-18-77

Title of Cause
Mikel J. Wand v. Joe Harris And Willie Reeves

Brief Statement of Motion

Memorandum order

The defendant Reeves motion for reconsideration; the court finds that plaintiff's suit is barred by the expiration of the statute of limitations provided by Ill. Rev. Stat. ch. 83, 15, and orders that this suit be dismissed. (see memo order for complete details)
DRAFT

Mar 22 1977

/s/ Leighton J

APPENDIX D

ARTICLE III. PUBLICATION RULE

Circuit Rule 35. The following rule is the Plan for Publication of Opinions of the Seventh Circuit promulgated pursuant to resolution of the Judicial Conference of the United States:

- (a) *Policy.* It is the policy of this circuit to reduce the proliferation of published opinions.
- (b) *Publication.* The court may dispose of an appeal by an order or by an opinion, which may be signed or per curiam. Orders shall not be published and opinions shall be published.
 - (1) "Published" or "publication" means:
 - (i) Printing the opinion as a slip opinion;
 - (ii) Distributing the printed slip opinion to all federal judges within the circuit, legal publishing companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media;
 - (iii) Permitting publication by legal publishing companies as they see fit; and
 - (iv) Unlimited citation as precedent.
 - (2) Unpublished orders:
 - (i) Shall be typewritten and reproduced by copying machine;
 - (ii) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, the lower court judge or agency in the case, and the news media, and

shall be available to the public on the same basis as any other pleading in the case;

- (iii) Shall be available for listing periodical- ly in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported), and the judgment or operative words of the order, such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth;
- (iv) Except to support a claim of res judi- cата, collateral estoppel or law of the case, shall not be cited or used as pre- cedent (a) in any federal court within the circuit in any written document or in oral argument; or (b) by any such court for any purpose.

(c) *Guidelines for Method of Disposition.*

(1) *Published opinions:*

Shall be filed in signed or per curiam form in appeals which

- (i) Establish a new or change an existing rule of law;
- (ii) Involve an issue of continuing public interest;
- (iii) Criticize or question existing law;
- (iv) Constitute a significant and non-duplicative contribution to legal literature
 - (A) by a historical review of law;
 - (B) by describing legislative history; or
 - (C) by resolving or creating a conflict in the law; or
- (v) Reverse a judgment or deny enforce- ment of an order when the lower court or agency has published an opinion sup- porting the order.

(2) *Unpublished orders:*

- (i) May be filed after an oral statement of reasons has been given from the bench and may include only, or little more than, the judgment rendered in appeals which
 - (A) are frivolous; or
 - (B) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where
 - (aa) a controlling statute or deci- sion determines the appeal;
 - (bb) issues are factual only and judgment appealed from is supported by evidence;
 - (cc) order appealed from is non-appealable or this court lacks jurisdiction or appellant lacks standing to sue; or
- (ii) May contain reasons for the judgment but ordinarily not a complete, nor neces- sarily any, statement of the facts in ap- peals which
 - (A) Are not frivolous but
 - (B) present arguments concerning the application of recognized rules of law, which are sufficiently substan- tial to warrant explanation but are not of general interest or impor- tance.

(d) *Disposition Is To Be by Order or Opinion.*

- (1) The determination to dispose of an appeal by unpublished opinion shall be made by a major- ity of the panel rendering the decision.
- (2) The requirement of a majority represents the policy of this circuit. Notwithstanding the

right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

(3) Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for disposition of appeals as set forth in this rule.

Supreme Court, U.S.
FILED

APR 14 1978

MICHAEL RODAK, JR., CLERK

No. 77-1294

In the
Supreme Court of the United States
OCTOBER TERM, 1977

WILLIE REEVES,

Petitioner,

vs.

MIKEL WAND,

Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-1294

WILLIE REEVES,

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**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

QUESTIONS PRESENTED

1. Will this Court disturb the decision of the United States Court of Appeals for the Seventh Circuit to apply Ill. Rev. Stat. ch. 83 §16 as the appropriate Illinois Statute of Limitations to be applied to an action under the Civil Rights Act 42 USC §1983?
2. Does Federal Law require any particular formula for applying a State Statute of Limitations to a Federal claim as a matter of State law?

STATEMENT OF THE CASE

The respondent filed his Civil Rights Complaint under 42 USC §1983 in the United States District Court for the Northern District of Illinois on January 21, 1975. The Complaint, as amended, alleges that on March 1, 1972 the petitioner, Willie Reeves, acting under color of law inflicted summary punishment upon the plaintiff and alleges that the rights sought to be enforced are secured to the respondent by the Fourteenth Amendment to the Constitution of the United States (Amended Complaint). The District Court denied petitioner's Motion for Summary Judgment, holding that the five-year Statute of Limitations contained in Ill. Rev. Stat. ch. 83 §16 governed. On Motion to Reconsider the District Court held that the two-year Statute of Limitations contained in Ill. Rev. Stat. §15 governed and entered judgment for the petitioner (Order March 18, 1977). The United States Court of Appeals reversed on the authority of *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977).

REASONS FOR DENYING THE WRIT

The Seventh Circuit followed the rule set down by this Court that Civil Rights claims are governed by the applicable limitation period which a Court of the State where the Federal Court sits would apply had the action been brought there. *O'Sullivan v. Felix*, 233 U.S. 318 (1914); *Beard v. Robinson*, 563 F.2d 331 at 334 (7th Cir. 1977). *O'Sullivan v. Felix* does not establish a particular formula by which the State law is to be applied. The case holds that the Statute of Limitations for the forum state governs civil rights action. The defendants in that suit had been convicted of criminal civil rights violations. The Court held that the Louisiana one-year Statute of Limitations governing "damages . . . resulting from offense or quasi offenses" . . . limited the civil suit and that the longer Statute of Limitation governing suits "for any penalty" did not apply. No search for an analogy between State and Federal action appear in *O'Sullivan v. Felix*, 233 U.S. 318, 321-325 (1914).

The petitioner attempts to draw unreasonable inferences from an aside in footnote 7 in *International Union v. Hoosier Cardinal Corporation*, 383 U.S. 696 at 705. The Court did observe that a suit for breach of a collective bargaining agreement is like a suit for breach of contract, but the Court developed no rigid formula which Federal Courts must apply in determining which State Statute of Limitations a State Court would apply to the Federal action if it were brought in State Court. Past decisions of this Court make it plain that such a selection is governed by State law as interpreted and applied by the Federal Courts of Appeals sitting in the several states. In *Johnson v. Railway Express Agency*, 421 U.S. 454 at 462-463 Note 7 the Court observed, "Our limited grant of

certiorari foreclosed our considering whether some other Tennessee statute, such as Tenn. Code Ann. §28-309 (1955) (six years for an action on a contract) or §28-310 (1955) ten years on an action not otherwise provided for) might be the appropriate one."

Similarly in *Runyon v. McCrary*, 427 U.S. 160 at 181 this Court declined to disturb the fourth circuit's selection of a State Statute of Limitations by saying:

"We are not persuaded that the Court of Appeals was mistaken in applying the 2-year state statute. The issue was not a new one for that court, for it had given careful consideration to the question of the appropriate Virginia statute of limitations to be applied in federal civil rights litigation on at least two previous occasions (*Allen v. Gifford*, 462 F.2d 615; *Almond v. Kent*, 459 F.2d 200). We are not disposed to displace the considered judgment of the Court of Appeals on an issue whose resolution is so heavily contingent upon an analysis of state law, particularly when the established rule has been relied upon and applied in numerous suits filed in the Federal District Courts in Virginia. In other situations in which a federal right has depended upon the interpretation of state law, 'the Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state law issue without such guidance must have justified a different conclusion.' *Bishop v. Wood*, 426 U.S. 341, 346, and n. 10, 48 L. Ed. 2d 684, 96 S. Ct. 2074, citing, *inter alia*, *United States v. Durham Lumber Co.*, 363 U.S. 522, 4 L. Ed. 2d 1371, 80 S. Ct. 1282; *Propper v. Clark*, 337 U.S. 472, 93 L. Ed. 1480, 69 S. Ct. 1333; *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 90 L. Ed. 358, 66 S. Ct. 445." *Runyon v. McCrary*, 427 U.S. at 181, 182.

By the cases *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977), *Wakat v. Harlib*, 253 F.2d 59 (7th Cir. 1958), *Baker v. F & F Investment*, 420 F.2d 1191, 1197-98 (7th Cir. 1970), and by the present case the Seventh Circuit has firmly defined the Illinois Limitations governing civil rights suits. This Court should not disturb that determination of state law.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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